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REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 516

LATROBE CONSTRUCTION COMPANY,
BRAGG'S ELECTRIC CONSTRUCTION COMPANY,
ARKANSAS COMPANY,
GENERAL STEEL PRODUCTS COMPANY,
JEFFERY LUMBER COMPANY,
PADGETT LUMBER COMPANY,
CHOCTAW, INC.,
IRA SHERRILL,
MILL AND MINE SUPPLY COMPANY,
CROW-BURLINGAME COMPANY — *Petitioners*

v.

UNITED STATES OF AMERICA — *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Argument	3
Conclusion	9
Appendix	11

CITATIONS

Albert Milling Co. v. Faubus Produce Co., 222 Fed. 915 (C.A. 8, 1955)	7
Bear Lake and River Waterworks & Irrigation Co. v. Garland, (1896), 164 U.S. 1, 17 S. Ct. 17, 41 L. Ed. 327	8
Buffington v. Owosso Mfg. Co., 105 Fed. 2d 692, (C.A. 8, 1939)	7
Commerce Trust Co. v. Chandler, 284 Fed. 737 (C.A. 1, 1922)	7
Flood v. U. S., 247 Fed. 209 (1st Circuit)	2
Mahdel Bros. v. Henry A. O'Neil, Inc., 69 Fed. 452, (C.A. 8, 1934)	6
Sisco v. McNutt, 209 Fed. 2d 550, (C.A. 8, 1954)	7
United States v. Hoth, 207 Fed. 2d 386 (C.A. 9th, 1953)	6
United States v. Waechter, 195 Fed. 2d 963 (C.A. 9th, 1952)	6

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REPLY BRIEF FOR THE LATROBE CONSTRUCTION COMPANY *ET AL*

The Government states that the question presented is "whether prior federal mortgage liens are entitled to priority over subsequent state miners' liens". As it is clear that the Court of Appeals placed its decision on the granting of a "contractual" lien in favor of the Government, rather than upon an express statutory lien in favor of the Government, we feel that the statement of the issues as outlined in detail on pages 2 and 3 of the petition for certiorari presents the questions to be determined.

In an appendix attached as page 11 to this reply brief, we are listing each case cited by the Government on the issue of priority in Section One of its Argument and

enumerating therein the Federal statute under which the lien was granted. We believe that this will clearly show that the issue which we have presented is not governed by the cases cited by the Government, as all involved express statutory liens. The Government did not cite a single case based on the "contractual" lien theory, and we submit that if this entirely new approach to the granting of priority is to be adopted, that it should be adopted by Congress. Since our petition was filed the case of *Flood* v. *U. S.*, 247 Fed. 209 (C.A.1, July, 1957), has come to our attention and the court there stated:

> "If the far-reaching step of upsetting the well established system of priority maritime liens should be taken, it seems to us that Congress is much better equipped to work out a comprehensive solution of problems involved, for example, to determine which type of maritime claims will be relegated to a position junior to a tax claim of the government and which type of maritime liens will remain superior to it."

The Government insists that certiorari should not be granted as the Government was entitled to priority under Section 5 of Act of March 3, 1797, 1 Stat. 512, 515, as amended R.S. 3466. We did not in our original petition mention this point as it was not considered by the trial court. In fact, it was not even brought to the attention of the trial court and the Court of Appeals did not base it decision on any relief afforded the Government under 31 U.S.C. 191 (A8 and A12).

However, since the issue has now been raised, we would like to present to this Court the same factual picture that was presented to the Court of Appeals by chronological statement of the case. We are outlining the twelve steps in this case as appeared in our brief in the Court of Appeals, using verbatim the language used in presenting the issue to that court.

ARGUMENT

1. The complaint was filed on January 8, 1954. No mention of any Federal statute or Federal law as to priority was alleged. There is a general allegation found in Section 9 of the complaint (R.18). It is as follows: 'All rights of the defendants named in sub-paragraphs A, B and C of this paragraph IX in and to the property mortgaged to the plaintiff are subsequent, inferior and subordinate to the rights of the United States of America under the real estate and Chattel Mortgage and the supplemental mortgage mentioned hereinabove.' This is simply a conclusion of law. All that the prayer for relief stated was that the Government should be granted a 'First, prior and paramount lien' (R.22). The complaint followed in meticulous detail the standard Arkansas allegations in mortgage foreclosures in that a Lis Pendens was filed in the counties in which the propery was located, in that all know lien claimants were made parties, in that equity of redemption under Arkansas law was sought to be foreclosed, in that a receiver was requested. The complaint did allege jurisdiction of the action by virtue of Sec. 1345, Title 28 U.S. Code and Sec. 2156 (b), Title 50 App. U.S. Code (R.3). This allegation is relevant in that it did show that Government counsel did plead whatever statutes that they deemed at that time necessary to present their theory of the lawsuit.

2. Typical of the answers filed by the defendant lien claimants is the answer and cross-complaint of Padgett Lumber Co., filed on February 25, 1954. At that time the lien claimant expressly set forth its contention as follows:

> "It admits this defendant's claim of liens as alleged in paragraph IX of the Complaint, but states that the lien claimed by this defendant, Padgett Lumber Company, in addition to being a mechanic's and or materialman's lien generally as provided by Sections 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated is also a 'Miner's Lien' as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source."

Also, the allegations are set out in detail in paragraph 15 of the answer (R.89). Thus, at the very outset of this protracted litigation the position of the lien claimants is set out.

3. The Government twice later amended its complaint, on June 21, 1954 (R.143), and on October 27, 1954 (R.151), but no allegation of any Federal Statute or any Federal law being applicable to the foreclosure suit was made.

4. On January 21, 1955, the Government filed its answer to the pleadings of the lien claimants. The Government denied that the lien claimants had a Miners' Lien (R.158) and at this stage of the litigation it was clear that the case was an adversary one in that the lien claimants had filed about 11 months earlier their pleadings, the Government still made no mention of any Federal statute or Federal law.

5. On January 20, 1955, the Government filed its pretrial brief, consisting of 23 pages, and the entire brief was devoted to Arkansas law, but failed to remotely hint that the Government had any theory of the law suit other than to try all of the issues under Arkansas law.

6. Later the Government filed its request for Conclusions of Law (Appellees' Supp. R.21-23), and no mention of any Federal Statute or of any Federal law is made.

7. On August 23, 1955, some 18 months after the original complaint was filed, the Government filed its final brief on the priority question. It consisted of 50 pages and discussed in great detail all of the claims put forth by the lien claimants, but again failed to urge as a defense any Federal statute or any Federal law.

Thus, the case was submitted to the Court after mature consideration by all parties, and after all parties had been given ample time to develop all applicable law, with all parties involved, the Government, the Lien Claimants and the Court directing their attention to the issues as formulated by the pleadings and the evidence introduced.

8. The Trial Court announced its decison on the priority question in an opinion of 55 pages in September, 1955 (R.172-231). The statement made in the opinion that Arkansas law was applicable was the only statement that could have been made in the case on the theories presented by all parties to the court.

9. The Government did not later bring to the attention of the District Court any contention that Federal statute or Federal law was applicable, by motion for amendment to findings under Rule 52 (b).

10. The Special Master proceeded to sell the property covered by the mortgage under Arkansas law as to notice, place of sale and other Arkansas requirements which were fully met.

11. The Government filed its notice of appeal on December 23, 1955, and there designated for the first time

that Federal law was applicable. It will be noted that this designation does not refer to any Statute nor does it in any way define the Federal law under which it now claims,

12. Counsel for lien claimants had no knowledge of any kind that the Government was relying on Sec. 3466, 31 U.S.C. Sec. 191, or that the Government had now shifted its claim to Federal law until the summer of 1956 when the brief was received."

At that time we challenged the Government to show where at any time in the trial court it had claimed that Federal law was applicable. The Government attempted to meet this challenge by quoting from a brief that it had filed in a matter not involving the petitioners and on page seven of the reply brief of the Government in the Court of Appeals, the petitioners' point is well established as the Government did not send a copy of this brief to the counsel for the petitioners. We might further add that the issue before the trial court, even as concerned Westmoreland Manganese Corporation, was not involved in any way in the terse preliminary statements in the Government's brief.

United States v. *Waechter*, 195 Fed. 2d 963 (C.A. 9th, 1952), and *United States* v. *Hoth*, 207 Fed. 2d 386 (C.A. 9th, 1953), clearly establish the rule that the fact that the Government is a party now urging a right to adopt a new theory and claim a new defense does not place the case on any stronger basis than that of private litigants.

The following cases all support the holding that a new theory of law will not be considered except "where the obvious result would be a plain miscarriage of justice". Ample refutation of such a charge is found in the opinion of the District Court dealing with every issue before that court. See *Mandel Bros.* v. *Henry A. O'Neil, Inc.*

69 Fed. 452 at 457 (C.A. 8, 1934); *Buffington* v. *Owosso Mfg. Co.*, 105 Fed. 2d 692 at 696 (C.A. 8, 1939); *Sisco* v. *McNutt*, 209 Fed. 2d 550 (C.A. 8, 1954); *Torpey* v. *Red Owl Stores, Inc.*, 228 Fed. 2d 117 (C.A. 8, 1955); *Albert Milling Co.* v. *Faubus Produce Co.*, 222 Fed. 1915 (C.A. 8, 1955); and *Commerce Trust Co.* v. *Chandler*, 284 Fed. 737 (C.A. 1, 1922).

It was plain to counsel for petitioners why the Government did not allege priority under 31 U.S.C. 191, in the petition in the District Court. This would have placed upon the Government the burden of proving insolvency in a contested proceeding and in a case where the mortgagee, the Westemoreland Manganese Corporation, in the words of the government supervisors had a contract that was practically a cost-plus contract. The litigation was protracted, lasting over many months, and no mention of proof of insolvency was ever made and in fact, the Government's case finally was based upon the validity of an amendment to the contract between the government and Westmoreland.

If the Government were allowed to claim that it could later adopt a new theory, then in effect the petitioners herein have never had an opportunity to contest the case. The statute now asserted by the Government is an ancient one daily used by the Department of Justice. It is inconceivable that the statute was overlooked by the skilled trial consel of the Government. The Petitioners are asking only that the Government now be precluded from moving the goal posts and changing the rule books in the middle of the game.

The third question that we presented in our petition was whether or not the Government may prevail under an after acquired property clause in its mortgage over the statutory miners' liens of the petitioners when the

mortgagor's title or improvements are created by the material sold or labor performed by the mining lien claimants, the petitioners herein. The only answer of the Government to this is found in their statement, "Thus, when the title to the various materials became vested in Westmoreland, they were not burdened with mechanics' or materialmen's liens." We submit that this begs the entire question presented. What time did title transfer and was the property burdened with the liens at the time of the transfer, were questions that were considered by the trial court and the Court of Appeals did not consider this problem in its opinion. The Government states that "equitable considerations would allow the Government to prevail". In determining whether or not which lien claimant should prevail in a contest between parties claiming after acquired clause in mortgage and a mining lien claimant, it is necessary to consider equitable issues and the trial court pointed this issue up when it stated at page 215 of the record:

> "After all, it must be kept in mind that but for the services and materials supplied by the lien claimants and others there would be no improvements on the property."

Then after refusing to accept the "relation back" theory as urged by the Government, the Court stated on page 215:

> "Assuming, however, that there is such a 'relation back' the same is a fiction and should not be indulged in so as to defeat the rights of suppliers who furnished the very materials to which the mortgagee's lien attached. As was said in the Bear Lake case, *supra*, 'the actual fact will be considered and not the fiction, 164 U.S. at 23'."

We believe that the Bear Lake case is in direct conflict with the holding of the Court of Appeals and that

this conflict alone provides sufficient grounds for the granting of the writ of certiorari.

Questions two and four as outlined in our petition are issues that are presented clearly by the petition and by the reply.

CONCLUSION

Since the Government has now raised the issue of the applicability of 31 U.S.C. 191, to this case, we request that this issue be submitted as one of the questions in this case: "Should the Government be allowed to adopt on appeal a new theory and claim a new defense which was not within the pleadings in the trial court and which defense was never brought to the attention of the trial court?" It is respectfully submitted that the petition for a writ of certiorari be granted by this Court.

Respectfully submitted,

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APPENDIX A

TABLE OF CASES CITED BY GOVERNMENT

Case	*Statutes Under Which Priority Allowed*
United States v. *Waddill Co.*, 323 U.S. 353	Section 3466 of Revised Statutes, 31 U.S.C.A. 191
United States v. *Gilbert Associates, Inc.*, 345 U.S. 361	3672 of Internal Revenue Code, 56 Stat. 798, 26 U.S.C.A. (1946 Ed.) 26 U.S.C.A. 3672; Section 3466 of Revised Statutes, 31 U.S.C.A. 191
Spokane County v. *United States*, 279 U.S. 80	U. S. Rev. Statutes, Section 3466
Illinois v. *Campbell*, 329 U.S. 362	Social Security Act 801, 802, 804, 807 (c), 42 U.S.C.A. 1000, 1002, 1004, 1007(c); 26 U.S.C.A., Internal Revenue Code 1400, et seq; 31 U.S.C.A. 191; Bankruptcy Act No. 3, Sub A, 11 U.S.C.A. 21
United States v. *White Bear Brewing Co.*, 350 U.S. 1010	26 A.S.C. 3670, 26 U.S.C.A. 3670

United States v. *Colotta*, 350 U.S. 808	Reversed per curiam
United States v. *Aeri*, 348 U.S. 211	26 U.S.C.A. 3672
United States v. *Scovil*, 348 U.S. 211	26 U.S.C.A., 3670-3672; 31 U.S.C.A. 191
United States v. *Liverpool and London Ins. Co.*, 348 U.S. 215	26 U.S.C.A., 3670-3672; 31 U.S.C.A. 191
United States v. *Security Trust and Savings Bank*, 340 U.S. 47	26 U.S.C.A. 3670-3672
United States v. *New Britain*, 347 U.S. 81	26 U.S.C.A., 3670; 31 U.S.C.A. 191
Rankin v. *Scott*, 12 Wheat 177, 179	No Federal Statute and no Government lien involved.
United States v. *City of Greenville*, 118 F. 2d 963 (C.A.4)	26 U.S.C.A., Int. Rev. Code §§ 3670-72; 3678
Paul v. *United States*, 127 F. 2d 64, (C.A.6)	Rev. Act 1926 § 315(a); 26 U.S.C.A. Int. Rev. Acts, p. 253; Rev. Act 1928 § 613(a); 26 U.S.C.A. Int. Rev. Acts, p. 461.